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No. 84-1340

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BRZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, DON PENSON, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF FOR JACKSON EDUCATION ASSOCIATION,
AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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WENDY WYGANT, *et al.*,
Petitioners,
v.JACKSON BOARD OF EDUCATION, *et al.*,
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Court of Appeals for the Sixth CircuitBRIEF FOR JACKSON EDUCATION ASSOCIATION,
AS AMICUS CURIAE SUPPORTING RESPONDENTS

This brief, *amicus curiae*, is filed by the Jackson Education Association with the consent of the parties, pursuant to the Rules of this Court.

INTEREST OF AMICUS

The Jackson Education Association ("JEA") is an employee organization, which since the mid-1960's has been recognized pursuant to Michigan law as the exclusive collective bargaining representative for the teachers employed by respondent Jackson Board of Education ("School Board"). JEA is a party to the collective bar-

gaining agreement that contains the affirmative action layoff provision at issue in this case.¹ Inasmuch as the Court is being asked to determine whether this provision is lawful or unlawful, JEA has a substantial interest in the outcome. Indeed, the very integrity of its collective bargaining agreement is at stake.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Bakke, Weber and Fullilove*,² several members of the Court expressed the view that evidence as to the background and purpose of race-conscious affirmative action measures is important, and even may be decisive, in determining whether the measures are lawful. The record in this case is virtually silent with regard to these matters: there was no discovery, no affidavits were filed, and the case was not tried on the merits. The lower courts sustained the contested provision on the pleadings and the limited facts that the parties placed before them.

Petitioners and various of their supporting *amici* argue that the judgment below cannot stand without certain facts that do not appear in the record. They urge the Court to reverse on the basis of the limited record before it.

JEAs national and state parent organizations, the National Education Association and the Michigan Education Association, have filed an *amicus curiae* brief in support of respondents. Although agreeing with respondents that the judgment below should be affirmed on the present record, they offer an alternative ground for upholding the challenged affirmative action layoff provision—*i.e.*, that the provision would in any event be lawful if it was

adopted by the school board as part of a comprehensive program designed to remedy the effects of its past educational discrimination and achieve a fully integrated school system. There may be, however, insufficient evidence in the present record to indicate whether this in fact was the purpose of the contested provision.

JEAs also supports respondents' position that the judgment of the lower court should be affirmed on the present record. If the Court disagrees, however, it should not hold the challenged affirmative action layoff provision invalid on the basis of the limited record that is before it. There is, in fact, a substantial body of evidence as to the background and purpose of the challenged affirmative action layoff provision that could be presented at trial. This evidence is contained in the official records of several prior administrative and judicial proceedings involving the School Board.³ Because JEA was a party to or otherwise involved in these prior proceedings, it is fully familiar with the evidence in question. The purpose of this *amicus curiae* brief is to bring this evidence to the attention of the Court, and demonstrate that if a more complete record is necessary to sustain the contested provision, such a record can be developed.

¹ JEA was not named as a defendant in this lawsuit, and did not participate in the proceedings below.

² *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1979).

³ We have been informed that the School Board intends to lodge copies of these records with the Court.

ARGUMENT

A. The Challenged Contract Provisions

This litigation has its roots in the collective bargaining agreement that was negotiated in 1972 between the School Board and JEA. Like other labor agreements, collective bargaining agreements entered into by the School Board and JEA are short-term contracts, lasting from one to three years. The 1972 agreement expired in the spring of 1973; in six successive contracts, the School Board and JEA included language essentially identical to the relevant provisions of the 1972 contract.⁴

These contracts contain three primary race-conscious provisions governing, respectively, the hiring, assignment and laying off of teachers. Although petitioners challenge only the constitutionality of the layoff provision, we summarize each of these provisions, because the relationship among them is of some importance.

Article VII(D)(1) provides that the School Board will take affirmative steps to recruit minority teachers:

The Board and the Association, in recognition of the desirability of multi-ethnic representation on the teaching faculty, hereby declare a policy actively seeking minority group personnel. . . . The goal of such policy shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools.⁵

This provision does not require the School Board to hire a particular number or proportion of black teachers in any given year. In practice, the proportion of blacks among

⁴ The various race-conscious provisions contained in the 1972 contract are numbered differently in several of the later contracts. For simplicity we refer to those provisions, as did petitioners, by the article numbers they bore in the 1972 contract—the first contract in which they appear.

⁵ J.A. 15.

newly hired teachers has varied widely since Article VII was agreed to.⁶ During the first ten years Article VII was in effect, no progress was made toward arriving at a faculty whose diversity matched the diversity of the Jackson student population. In the 1971-72 school year, the proportion of minority teachers was just over half the proportion of minority students.⁷ Eleven years later, in 1982-83, the proportion of minority teachers was still just over half the proportion of minority students.⁸

The assignment of teachers to particular schools is governed by Articles VII(D)(3) and VIII(E)(2). Article VIII(E)(2) empowers the Board to transfer teachers in order to achieve "acceptable racial balance standards."⁹ Article VII(D)(3) defines the range of "acceptable racial balance" in such a way that the School Board may initiate involuntary transfers if the percentage of minority teachers at a given school is less than one-half, or more than twice, the systemwide proportion of minority teachers.¹⁰ The proportion of minority teachers to be assigned to a given school is not in any way tied to the proportion of minority students at that school. Rather, the evident purpose of Articles VII(D)(3) and VIII(E)(2) is to assure a reasonably even distribution of white and minority teachers throughout the school system, without regard to differences in the distribution of minority students.

The layoff provision at issue in this case appears in Article XII(B)(1):

⁶ The 1981 seniority list contains 20 teachers hired in 1972, of whom 8, or 40%, were black. On the other hand, among those hired in 1976 and 1977, respectively, the proportion of blacks was 0% and 18%. J.A. 87-100.

⁷ Pet. App. 21a.

⁸ J.A. 103, 108.

⁹ J.A. 22.

¹⁰ J.A. 16. The systemwide proportion is determined separately for the elementary, junior high, and high school levels. *Id.*

In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, *except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.* (Emphasis added).¹¹

By its express terms, Article XII(B)(1) maintains the proportion of minority faculty at whatever level it may be when layoffs are ordered. Inasmuch as the proportion of minority faculty never has reached the proportion of minority students in the school system,¹² the operative effect of Article XII to date has been to preserve the progress that has been made toward reaching that goal.

The history of these contract provisions is reflected in the records of several administrative and legal proceedings: beginning with a 1969 complaint before the Michigan Civil Rights Commission, and continuing with lawsuits filed in both federal and state courts, *Jackson Education Association v. Board of Education of the Jackson Public Schools*, Civil No. 4-72340 (E.D. Mich.) ("Jackson I"), and *Jackson Education Association v. Board of Education of the Jackson Public Schools*, No. 77-011484CZ (Jackson County Circuit Ct.) ("Jackson II"). We discuss each of these proceedings in turn below.

¹¹ J.A. 13. Notwithstanding the apparently straightforward language of the first part of this provision, other provisions of the collective bargaining agreement dictate that layoffs are not made simply on the basis of district-wide seniority. Layoffs are made within each school from among teachers occupying the particular type of position to be eliminated. Thus, if the Board decided to lay off a physics teacher at one school, the displaced teacher might well have more seniority than an English teacher at that school, or a physics teacher at another school. Under some but not all circumstances, a senior displaced teacher can "bump" a more junior teacher with the same specialty who is working at another school. J.A. 23-28.

¹² J.A. 103, 108.

B. The 1969 Proceedings Before the Michigan Civil Rights Commission

On April 14, 1969, the Jackson Branch of the NAACP filed a complaint against the Jackson public schools with the Michigan Civil Rights Commission, alleging "discrimination in equal educational opportunities."¹³ The complaint charged that students in the Jackson public schools, and especially in Frost Junior High School, were suffering discrimination in curriculum and in discipline,¹⁴ that teachers and administrators had "lower expectations of black students" and "interact[ed] negatively with black students on the basis of preconditioned methods and techniques of dealing with black students,"¹⁵ and that counselors were not "sensitive to the needs of black students" and did not "relate to releasing the educational and emotional potential of black students."¹⁶ The complaint also singled out the near-absence of black professional employees throughout the Jackson school system as one of the practices that discriminatorily affected black students, alleging that "Frost and the Jackson Public Schools are discriminatory in hiring practices."¹⁷

When the Commission investigated the complaint, the Superintendent of Schools reported to the investigator that out of a teaching and administrative staff of 697, "there are now 31 certified black personnel presently in the system, 7 of whom were hired since September 1968. . . . He stated it is the usual procedure to accept applications at the Central Administration Personnel Office and referrals are then sent to various schools to be inter-

¹³ Michigan Civil Rights Commission Complaint No. 6485-ED (April 14, 1969).

¹⁴ *Id.* ¶¶ 1-3.

¹⁵ *Id.* ¶ 4.

¹⁶ *Id.* ¶ 6.

¹⁷ *Id.* ¶ 5.

viewed by principals where openings may exist. It is generally the principal's decision whom he will employ on his staff."¹⁸ The Superintendent acknowledged that the "imbalance" of black teachers in the system was unacceptable,¹⁹ and, indeed, the facts provided by the Superintendent to the MCRC investigator showed that eight of nine all-white elementary schools had all-white faculties, while fully half of the black teachers were concentrated in just two elementary schools, which were 72% and 79% black.²⁰

Based on these and other facts, the Commission issued a preliminary report concluding that "each of the allegations as stated in the complaint can be substantiated based upon organizational records, court files, school records, special committee reports and the appraisal conducted by the Superintendent of Schools."²¹ In the face of these preliminary investigative findings, the School

¹⁸ Complaint No. 6485-ED, Preliminary Investigation Report, pp. 7, 11 (June 16, 1969). The investigatory report also included a detailed account of the information provided by one local black leader: "According to Mr. White, through his hundreds of contacts with families and students since 1962, the black community believes the lack of black teachers lies with the personnel office who have in the past failed to refer black applicants to openings throughout the system and sent them only to inner city, racially imbalanced black elementary schools. He named 6 certified black teachers, residents of Jackson, who are presently teaching in another system as a result of previous denial of employment in the Jackson School system. He stated there are many more young people who have left the community after receiving their degree because of the limited possibilities they envisioned within this school system." *Id.* at 8.

¹⁹ *Id.* at 7.

²⁰ *Id.*, Exhibits 15 and 19. The all-white schools with all-white faculties were Cascades, Dibble, Firth, Griswold, Harrington, Ridgeway, Sharp Park, and Trumbull. The schools that were 72% and 79% black, respectively, were Helmer and McCulloch.

²¹ *Id.* at 11.

Board did not admit that it had committed any unlawful discrimination, but it agreed on September 30, 1969, to a binding "adjustment," approved by the Commission. That agreement contained specific provisions dealing with each of the NAACP allegations that the Commission's investigation had documented. With regard to its employment practices, the Board agreed to:

[t]ake affirmative steps to recruit, hire and promote minority group teachers and counselors as positions become available and pursue other programs now in progress to provide equality of opportunity.²²

Less than one month later, a citizens' committee that earlier had been established by the School Board concluded that "equal opportunities do not exist for [minority] persons" in the school system.²³ It found problems in the curriculum, in discipline, in counseling, and in communication with the minority community. It also found "[a]n inadequate number of minority group professionals"²⁴ and recommended that affirmative steps be taken to recruit minority teachers.²⁵ The committee concluded that an increase in the number of minority teachers was essential for the education of black as well as white students.²⁶

²² Notice of Disposition of Complaint No. 6485-ED, Paragraph II (5) (Sept. 30, 1969). This statement of what the School Board had agreed to do was immediately followed in the Notice of Disposition by this statement:

The Commission recommends a review of teacher assignments to ascertain that equal opportunity and good balance is reflected at all schools from the standpoint of race, sex, age, educational background and experience of teachers.

Id.

²³ Report of the Racial Subcommittee to the Jackson Public Schools' Advisory Committee, adopted October 13, 1969, p. 5.

²⁴ *Id.* at 5.

²⁵ *Id.* at 1.

²⁶ *Id.* ("Jackson needs more qualified minority group teachers, administrators and counselors . . . Minority group students . . .

C. Jackson I

The affirmative action layoff provision that is challenged in this case was first placed in the collective bargaining agreement between JEA and the School Board in 1972, and had to be implemented only a year later. In the spring of 1973, the School Board ordered a number of temporary layoffs, and the teachers to be laid off were selected in compliance with Article XII.²⁷ In 1974, when another round of layoffs was required, the School Board refused to apply Article XII, concerned that if it did so a white teacher adversely affected by the operation of that provision could bring suit claiming that Article XII was either unlawful or unconstitutional.²⁸ JEA brought suit in federal court to enforce its contract. It was joined as plaintiff by two black teachers who had been laid off as a result of the School Board's non-compliance with Article XII. The plaintiffs attempted to allege a federal cause of action under Title VII and asked the federal court also to exercise pendent jurisdiction over their claim for enforcement of Article XII under Michigan law.

Although the *Jackson I* litigation was dismissed after trial for lack of subject matter jurisdiction,²⁹ a signifi-

need to associate with persons of their own ethnic extraction who have proven levels of achievement. White students have to grow up in schools where successful minority group professional people are more frequent because the attitudes these students form in their school years are the attitudes they carry through life.")

²⁷ Transcript of Proceedings, March 31, 1976, in *Jackson I*, at 47-48 (hereinafter cited as "Jackson I transcript").

²⁸ At the hearing in *Jackson I*, counsel for the School Board explained the dilemma confronting the Board, noting that it "is faced with a choice under this case of either this kind of action or a suit on tenure by the displaced white teacher or for that matter a federal action being brought by those teachers . . . alleging that what we have is a quota system which is itself violative of the Civil Rights Act." *Jackson I* transcript at 57.

²⁹ J.A. 34.

cant amount of evidence regarding the background of Article XII was presented in that proceeding, particularly in the form of testimony by the JEA official and the school superintendent who originally had negotiated the provision. That background begins with the history of desegregation of the Jackson public schools.

Prior to 1960, almost all of the black students in Jackson were assigned to a few schools within the school system, a situation the School Board apparently regarded as improper in light of this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). In 1963, the boundary lines for the city's two high schools were redrawn in such a way that the proportion of minority students in the two schools was equalized.³⁰ Six years later, the School Board redrew the boundary lines for assigning students to junior high schools, thus eliminating any racial identifiability of those schools.³¹ The integration of the elementary schools proved a considerably more difficult matter, and it was the subject of a series of studies and proposals from 1969 until the School Board finally ordered a desegregation plan into effect for the 1972-73 school year.³²

The desegregation of the elementary schools presented three distinct, though historically related, problems. First, black elementary students were overwhelmingly concentrated in a handful of the city's twenty elementary schools. In the school year 1966-67, over 84% of all

³⁰ Deposition of Lawrence Read, May 16, 1975, at 6 (hereinafter cited as "Deposition of Lawrence Read"). Dr. Read was Superintendent of the Jackson schools from 1968 until 1973. The deposition is part of the record in *Jackson I*.

³¹ *Id.* 7-8.

³² The Appendix to this Brief contains tables showing the racial composition of each of Jackson's schools, both for students and faculty, as published by the United States Department of Health, Education, and Welfare for every other school year between 1966 and 1973. We are informed that data are not published for the other years in that period.

minority students in the elementary grades were assigned to just four schools, while nine schools were at least 99% white.³³ Second, prior to this time, there had been a policy of "placing of the majority of black staff persons in predominantly black schools."³⁴ As late as the 1971-72 school year, there were no minority teachers at 13 of the elementary schools.³⁵ Third, until the mid 1950's, the School Board had never hired a minority teacher, and as of the late 1960's, the Board had chosen to hire only a "negligible" number of minority teachers.³⁶ The 1981 seniority list contains the names of 80 teachers hired between 1964 and 1966; all of them are white.³⁷

To assist it in formulating a plan for integrating the elementary schools, the School Board appointed several committees, conferred with JEA, and established an office of minority affairs. In October of 1969, the first of those committees issued a report calling for immediate action to redraw the elementary school boundaries to improve racial balance, and the adoption of whatever steps might be necessary to achieve "full and equal integration of the Jackson Elementary Schools by September of 1972."³⁸ This proposal recognized that faculty integration was an integral part of a desegregation effort, urg-

³³ Appendix to Brief, 1966-67 Table.

³⁴ Plaintiffs' Exhibit 4, *Jackson I*, Recommendation of Minority Affairs Office.

³⁵ Deposition of Lawrence Read at 52.

³⁶ Deposition of Lawrence Read at 4. The first black teacher was hired in 1953. Pet. App. 20a. During the 1966-67 school year, only 3% of the faculty was non-white. Plaintiffs' Exhibit 15, *Jackson I*. See also Deposition of Lawrence Read at 22-23.

³⁷ J.A. 68-75.

³⁸ Plaintiffs' Exhibit 1, *Jackson I*, Recommendations of Jackson Public Schools Ad Hoc Committee, p. 2. The committee consisted of the superintendent of schools, four principals, one teacher, and the JEA Executive Secretary.

ing that by the fall of 1970, there be an "integrated staff at each elementary school with a minimum of two minority group teachers in each school."³⁹ In 1969, the School Board adopted this report as its official policy.⁴⁰ The recommendation of the 1969 report regarding faculty could not be immediately implemented, however, in part because there were so few minority teachers then employed as elementary school teachers. The school superintendent explained that as of 1969, forty additional minority teachers would have had to be hired to have a sufficient number to place two at each school.⁴¹

Subsequently, a second committee appointed by the School Board undertook to study the problem of integrating the elementary schools in more detail. Despite a storm of community controversy, the committee itself favored "the adoption of total racial integration as soon as possible," a step that it concluded would require busing.⁴² But the elementary school principals did not support "total racial integration of the elementary schools at this time" and a large majority of the parents were "strongly opposed" to busing.⁴³ For those reasons, the majority of the committee,⁴⁴ over a strong dissent,⁴⁵ proposed a desegregation plan that involved no busing. The committee also recommended the "integration of . . .

³⁹ *Id.* at 1. The report also recommended "[p]rofessional growth experiences for the staff in order to develop an awareness of, and sensitivity to, the problems of minority groups in our schools." *Id.*

⁴⁰ Deposition of Lawrence Read at 10, 11.

⁴¹ *Id.* 10; Proposed Joint Pre-Trial Order, *Jackson I*, p. 2.

⁴² Plaintiffs' Exhibit No. 2, *Jackson I*, "Elementary School Redistricting Recommendations," at 3.

⁴³ *Id.* at 3.

⁴⁴ *Id.*, unnumbered pages.

⁴⁵ *Id.*, "Addenda to Redistricting Subcommittee Report, comments of Mary Ann Alber, Alonzo Littlejohn, Carl Breeding, Bruce Wilkins."

the teaching staff throughout the district"; on this recommendation, there was no dissent.⁴⁶

Following a series of public hearings, the School Board concluded that these committee recommendations would not accomplish desegregation of the elementary schools, and applied for a federal grant to study alternative methods for effective desegregation. After almost a year of study, the School Board's official Citizens Advisory Committee presented four recommendations to the School Board. Those four recommendations were as follows:

1. "That all elementary schools be desegregated. It is recommended that all schools have a racial balance of between 11 and 21 percent black students. The optimum being 16 percent black."
2. "That desegregation be put into effect with the beginning of the 1972-73 school year; namely, the fall of 1972 and all possible efforts be made to integrate the schools as soon as possible."
3. "That the Board of Education direct the school administration to work towards a teaching staff, in the elementary schools, that also achieves a racial balance as close as possible to that of the students with a minimum of two black teachers in every school."
4. "That the method of desegregation be a Princeton and/or 45-15 type program."⁴⁷

In March 1972, the School Board adopted the Citizens Advisory Committee's recommendations, and moved to integrate the schools beginning in the fall of 1972.⁴⁸

⁴⁶ *Id.* at 3. *See also id.* at 4 (urging "improving the mix of teachers").

⁴⁷ Plaintiffs' Exhibit 7, *Jackson I*, Report to Board of Education, Jackson Public Schools, from the Citizens Advisory Committee, dated Feb. 18, 1972.

⁴⁸ Deposition of Lawrence Read at 40, 46.

Testimony of the school superintendent shows that school officials believed that federal laws required these measures to desegregate the schools.⁴⁹ By the spring of 1972, a number of other school districts in Michigan had been named in federal desegregation suits or were already under federal court orders.⁵⁰ In a written explanation of the desegregation plan distributed to parents in April of 1972, the School Board explained why it was taking voluntary action rather than waiting for a court order:

Waiting for what appears the inevitable only flames passions and contributes to the difficulties of an orderly transition from a segregated to a desegregated school system. *Firmly established legal precedents mandate a change.* Many citizens know this to be true. Waiting for a court order emphasizes to many that we are quite willing to *disobey the law* until the court orders us not to disobey the law.⁵¹

⁴⁹ Deposition of Lawrence Read at 65-68.

⁵⁰ *Id.* at 43.

⁵¹ Plaintiffs' Exhibit No. 8, *Jackson I*, question 4 (emphasis added). The superintendent also testified that he had been warned by NAACP officials that the NAACP was prepared to file suit to force desegregation if the School Board did not act voluntarily. Deposition of Lawrence Read at 44. When the School Board postponed action on the desegregation proposal in early March 1972, *id.* at 40, 46, the NAACP filed a complaint with the Michigan Civil Rights Commission, alleging *inter alia* that the elementary schools were segregated, that the district was not committed to a timely desegregation process, and that over 40% of the black teachers were assigned to two elementary schools that were 60% and 86% black. Michigan Civil Rights Commission Complaint No. 14702ED (Mar. 17, 1972). This complaint was not investigated until 1974. At that time, on the basis of evidence that the schools had been desegregated in the interim and that as part of the desegregation plan affirmative action had been taken to cure the faculty imbalance, the MCRC ordered the complaint "dismissed without a finding as adjusted." Notice of Disposition, Complaint No. 14702ED (Aug. 30, 1974).

During the period from 1969 to 1972, while the problem of desegregation was still under discussion, the School Board began taking steps to deal with the scarcity of minority teachers that had been caused by its practices and that would stand in the way of effective desegregation. A provision on affirmative action was negotiated and placed in the 1970 collective bargaining agreement with JEA. It provided:

The Board of Education and the Association in recognition of the desirability of multi-ethnic representation on the teaching faculty, hereby declare a policy of actively seeking minority group personnel. The goal of such policy shall be to have at least 15 percent of every building staff from minority racial groups.

The School Board acted in accordance with this declared policy of affirmative action, and succeeded in recruiting and hiring more minority teachers.⁵² Between the 1967-68 school year and the 1971-72 school year, the number of minority teachers more than doubled, from 21 to 50.⁵³

The problem that ultimately gave rise to Article XII occurred in 1970 and 1971, when declining enrollment required faculty layoffs. Under the collective bargaining agreement in effect at the time, teachers were laid off on the basis of seniority. Because a substantial majority of the district's minority teachers had been hired since 1969 and had limited seniority, the 1970 and 1971 layoffs substantially nullified the School Board's recent efforts to recruit and hire more non-white teachers. The effect of those layoffs, the school superintendent testified, was to "literally wipe out all the gain that had been made

⁵² *Jackson I* transcript at 18-19; Deposition of Lawrence Read at 5, 22.

⁵³ Plaintiffs' Exhibit 15, *Jackson I*.

in terms of affirmative action . . .".⁵⁴ Minority teachers recruited and hired one year were simply laid off the following year.⁵⁵ Even worse, there was no end in sight. The district's enrollment was declining, and layoffs were to be anticipated in successive years as well.⁵⁶ If the School Board were to integrate the faculty, it could not simply proceed with layoffs based on seniority and rely on being able to recall the laid-off teachers after a short time.

This layoff problem led to a series of meetings among the School Board's administrators,⁵⁷ between School Board and JEA officials,⁵⁸ and between JEA leaders and representatives of the minority teachers.⁵⁹ By the beginning of 1972, JEA's officers had already begun to consider possible alternatives to the seniority layoff rule because JEA recognized that some modification of the rule was necessary to bring about faculty integration.⁶⁰

⁵⁴ Deposition of Lawrence Read at 24.

⁵⁵ *Id.*

⁵⁶ *Jackson I* transcript at 20. Indeed, at the trial of *Jackson I* in 1976, there was testimony that the declining enrollment had continued "to dictate teacher layoffs each year." *Id.* The enrollment figures, declining steadily from 1968-69 through 1975-76, appear in Plaintiffs' Exhibit 15, *Jackson I*.

⁵⁷ *Jackson I* transcript at 25.

⁵⁸ Deposition of Lawrence Read at 29.

⁵⁹ *Id.* at 35.

⁶⁰ *Jackson I* transcript at 29-30. The 1972 desegregation plan, as noted above, again had called for at least two minority teachers in every school. Page 14, *supra*. There were still too few minority teachers in the system to meet that goal. *Jackson I* transcript at 27.

In January of 1972, the Minority Affairs Office circulated to the teachers a questionnaire soliciting their views on such alternatives. JEA's leaders regarded this as an unfair labor practice and instructed JEA members to respond by favoring continuation of the seniority rule. JEA's leaders adopted this measure solely as a negotiating tactic, and did not intend for the response to reflect the views of JEA or its members. *Id.* at 25, 29.

In the summer of 1972, very shortly after the School Board had adopted its desegregation plan, the collective bargaining agreement between the School Board and JEA was renegotiated. In response to the problem of layoffs wiping out all progress in minority hiring, the School Board proposed a complete freeze on layoffs of minority teachers until the proportion of such teachers reached 15%.⁶¹ JEA strongly opposed this proposal.⁶² The parties ultimately adopted Article XII, as a compromise measure that protected the School Board's progress in hiring the minority teachers that it needed for implementation of its desegregation plan but that did not place the entire burden of layoffs on white teachers.⁶³ Although JEA went on strike in the fall of 1972, it did so over other issues, not the layoff rules.⁶⁴

The JEA leadership favored the Article XII compromise. JEA's members were of the opinion that more minority teachers were needed, and Article XII was seen to be necessary to achieve the widely accepted goal of "having minority teachers in every building" and "to correct past problems."⁶⁵ In 1973, following a change in membership on the School Board, the Board proposed deleting Article XII from the collective bargaining agreement, but JEA successfully insisted that Article XII remain in the agreement.⁶⁶

The school superintendent and the JEA official who had negotiated Article XII gave similar explanations for that

⁶¹ Deposition of Lawrence Read at 28; *Jackson I* transcript at 31.

⁶² Deposition of Lawrence Read at 28-29.

⁶³ *Id.* at 32-34; *Jackson I* transcript at 35; Proposed Joint Pre-Trial Order, *Jackson I*, p. 3.

⁶⁴ *Jackson I* transcript at 39-40, 43; Deposition of Lawrence Read at 59.

⁶⁵ *Jackson I* transcript at 42-43.

⁶⁶ *Id.* at 50-51.

provision in their testimony in *Jackson I*. First, Article XII was regarded as an "integral part" of the desegregation plan; without the protection it afforded to minority teachers, the School Board could not have achieved the repeatedly expressed goal of desegregating the faculty and placing two minority teachers in each school.⁶⁷ Second, the limited protection offered by Article XII was regarded as essential to the School Board's future ability to attract and hire minority teachers. The Jackson School Board hires many of its teachers from colleges outside of, and often long distances from, Jackson. Many of the minority teachers whom Jackson wanted to attract were from southern colleges, and those teachers were reluctant to move to Michigan if they faced an imminent threat of layoff.⁶⁸ The layoffs of large numbers of minority teachers in 1970 and 1971 made it far more difficult for the School Board to recruit these teachers,⁶⁹ and the absence of Article XII would have "cripple[d] . . . greatly" the School Board's efforts to recruit minority teachers.⁷⁰ Third, both the School Board and JEA were

⁶⁷ Deposition of Lawrence Read at 69 (without the layoff provision "[e]verything else is in danger, if not destroyed"); *Jackson I* transcript at 20 (change in layoff rules needed "to prevent the fruits of recruitment from being wiped out the following spring"); *id.* at 42 ("if we didn't do some modifications in the seniority system, we certainly weren't going to achieve the goals we were talking about before"); Proposed Joint Pre-Trial Order, *Jackson I*, pp. 2-3 ("the active minority recruitment program was . . . suffering from the impact of continuing layoffs dictated by economic circumstances and magnified by the straight systemwide seniority system mandated by the existing collective bargaining agreement. To correct this situation, and to 'end up with a truly integrated school system,' the Board and JEA agreed to adopt Article XII").

⁶⁸ *Jackson I* Transcript at 55; Deposition of Lawrence Read at 73-75.

⁶⁹ *Jackson I* transcript at 20.

⁷⁰ *Id.* at 56; see also *id.* at 55 (convincing minority teachers to move to Jackson from the South was particularly difficult without Article XII).

persuaded that to provide an effective education, particularly for minority students, it was necessary to have a substantial number of minority faculty members.⁷¹

The litigation in *Jackson I* was resolved without addressing the merits of the claims in that dispute or the claims raised in this case. In *Jackson I*, the plaintiffs alleged that prior to 1972 the School Board, in violation of Title VII of the 1964 Civil Rights Act, and of the Fourteenth Amendment, had engaged in practices that had the effect of discriminating on the basis of race in the hiring of teachers.⁷² The district court concluded that it lacked jurisdiction over the subject matter of the action.⁷³ The court reasoned that the basic controversy between the parties was the School Board's refusal to comply with the collective bargaining agreement. The plaintiffs' claim, therefore, was simply a contract claim arising under state law, and "[a]ny federal claim advanced by plaintiffs was advanced to set forth a pretex-

⁷¹ *Jackson I* transcript at 56:

It is a great deal of help to both students and other staff in a particular school to have a mixed staff of minority teachers, black teachers on the staff. Gives the black students someone they can, you know, have an affinity with if they can look up to, if you will and it gives, I think if anything, more importantly more accurate and better picture if you will of minority people to white students

Deposition of Lawrence Read at 75:

Q: . . . [w]hen you arrived at the conclusion to have the affirmative action program . . . you did that for education reasons?

A. Well, yeah. I guess you could say that part of the educational setting is to present a multi-cultured environment. Children didn't see black people as maids and menials, that they saw them as professional people. And that . . . is education.

See also *id.* at 65-66, 76-77.

⁷² J.A. 30-31, 34 n.3.

⁷³ *Id.* at 34.

tual jurisdictional basis so that the court could decide the real dispute between the parties—the contractual claim.”⁷⁴

D. Jackson II

Jackson I was dismissed on January 12, 1977.⁷⁵ Soon afterward, JEA filed a state court action against the School Board to enforce Article XII.⁷⁶ That case was *Jackson Education Association v. Board of Education of the Jackson Public Schools*, No. 77-011484CZ (Jackson County Circuit Court) (“*Jackson II*”). The pleadings and exhibits from *Jackson I* were made part of the record by stipulation in *Jackson II*, together with agreed statements of facts.⁷⁷ The School Board filed a motion for summary judgment on this record, arguing that Article XII violated the Michigan Teacher Tenure Act, the Michigan Civil Rights Act, and Title VII.⁷⁸

The state court rejected the Board's motion for summary judgment and upheld Article XII. It held that Article XII was consistent with the state Teacher Tenure Act,⁷⁹ and that it violated neither Title VII nor the federal constitution.⁸⁰ Although the state court assumed

⁷⁴ *Id.* at 37. The Court also held that it lacked jurisdiction over the asserted Title VII claim because plaintiffs had failed to comply with the procedural prerequisites for suit, and that although plaintiffs had amended their complaint to allege jurisdiction based on Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, *et seq.*, they had not alleged any facts that would constitute a violation of that statute nor had their proof established that the School Board's refusal to comply with the contract amounted to such a violation. J.A. 37-38.

⁷⁵ JEA appealed the district court's decision to the Sixth Circuit, but subsequently withdrew that appeal.

⁷⁶ J.A. 40-41.

⁷⁷ J.A. 41.

⁷⁸ J.A. 47.

⁷⁹ J.A. 44-47.

⁸⁰ J.A. 47-53.

that there had been no prior discrimination by the School Board against minority faculty members,⁸¹ it concluded that the existence of such past discrimination was not required to uphold a race-conscious measure such as Article XII. The state court reasoned that the effective education of minority students required the School Board to take steps to overcome the effects of past societal discrimination that had earlier limited the number of minority teachers hired by the Board.

[H]ow can a minority child aspire to a teaching career or other career requiring an advanced education if a disproportionately small number of such minority teachers are represented in the school system?

The effects of such daily observed societal discrimination discourage his ambition; the effects of such daily observed societal discrimination feed and encourage racial hatred and distrust of "whitey"....⁸²

The state judge declined to hold that race-conscious affirmative action could be lawfully promulgated only by a court, insisting that the democratic process and collective bargaining were the preferable method for resolving the difficult issues posed by efforts to overcome the effects of societal discrimination.⁸³ The court, therefore, entered a declaratory judgment that the School Board had violated Article XII, and directed the Board to pay damages to the minority teachers who had been injured by that violation.⁸⁴

E. Significance of These Facts

The facts recited above show that substantial evidence is available in the records of earlier proceedings to establish that the provision challenged in this case was adopted

by the School Board as part of a comprehensive program to desegregate its schools, to remedy the continuing effects of this past educational discrimination, and also to remedy its prior employment discrimination against minority teachers. Other briefs that are being filed in this action, including the brief of JEA's state and national parent organizations, the Michigan Education Association and the National Education Association, demonstrate that an affirmative action layoff provision such as that at issue here can be sustained as a lawful remedy for a school board's own past educational discrimination or as a lawful remedy for a board's own past employment discrimination. If the Court does not affirm the decision below on the grounds advanced by respondents or by their other supporting *amici*, it should not hold the challenged affirmative action layoff provision invalid on the basis of the present limited record. The case should rather be remanded for the development of a full record to inform the resolution of the extremely important issues presented.

CONCLUSION

For the reasons set forth in Respondents' Brief, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed. If the judgment is not affirmed, the case should be remanded for development of a full evidentiary record.

Respectfully submitted,

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⁸¹ J.A. 43.

⁸² J.A. 52.

⁸³ J.A. 52.

⁸⁴ J.A. 53.

APPENDIX

APPENDIX

JACKSON PUBLIC SCHOOLS 1966-1967

Source: *Public Elementary and Secondary Schools in Large School Districts with Enrollment and Instructional Staff, By Race, Fall 1967*, U.S. Dept. of Health, Education and Welfare, Office of Education, and National Center for Educational Statistics, Washington, D.C.: GPO, 1969. Data for Michigan in this publication were for the 1966-67 school year.

	STUDENTS			FACULTY		
	# White	# Minority	% Minority	# White	# Minority	% Minority
High Schools						
Jackson	1252	115	8.4	74	0	0.0
Parkside	1503	249	14.2	36	3	3.0
Junior High Schools						
East	588	119	16.8	35	4	10.3
Frost	831	173	17.2	44	2	4.3
Hunt	780	45	5.5	37	3	7.5
Elementary Schools						
Allen	397	180	31.2	30	4	11.8
Amy Firth	294	8	2.6	12	0	0.0
Austin Blair-Reed	294	29	9.0	8	3	27.3
Bennett	400	25	5.9	16	0	0.0
Blackman	242	65	21.2	12	0	0.0
Bloomfield	485	0	0.0	14	1	6.7

	STUDENTS			FACULTY		
	# White	# Minority	% Minority	# White	# Minority	% Minority
Cascades	492	2	0.4	15	0	0.0
Dibble	243	2	0.8	11	0	0.0
Griswold	521	1	0.2	18	0	0.0
Harrington	483	0	0.0	16	0	0.0
Helmer	145	345	70.4	21	3	12.5
Lincoln	322	31	8.8	13	0	0.0
Longfellow	412	0	0.0	15	0	0.0
Mathilda B. Honer	137	26	16.0	8	0	0.0
McCulloch	155	382	71.1	19	2	9.5
Ridgeway	362	0	0.0	12	0	0.0
Sharp Park	411	0	0.0	14	0	0.0
TA Wilson	390	11	2.7	18	0	0.0
Tomlinson	337	175	34.2	18	1	5.3
Trumbull	397	3	0.8	15	0	0.0
<i>Total:</i>	11,873	1986	14.3	591	26	4.2

2a

JACKSON PUBLIC SCHOOLS 1968-1969

Source: *Directory of Public Elementary and Secondary Schools in Selected Districts: Enrollment and Staff by Racial/Ethnic Group*, U.S. Dept. of Health, Education, and Welfare, Office for Civil Rights, Washington, D.C.: GPO, Fall, 1968

	STUDENTS			FACULTY		
	# White	# Minority	% Minority	# White	# Minority	% Minority
High Schools						
Jackson	1364	157	10.3	53	4	7.0
Parkside	1647	287	14.8	69	6	8.0
Junior High Schools						
East	634	141	18.2	26	4	13.3
Frost	792	234	22.8	43	1	2.3
Hunt	817	44	5.1	34	2	5.6
Elementary Schools						
Allen	428	120	21.9	25	3	10.7
Amy Firth	334	5	1.5	11	0	0.0
Austin Blair-Reed	286	34	10.6	9	1	10.0
Bennett	487	28	5.4	17	1	5.6
Blackman	209	74	26.1	10	0	0.0
Bloomfield	424	1	0.2	14	1	6.7
Cascades	417	0	0.0	14	0	0.0
Dibble	347	27	7.2	14	0	0.0
Griswold	512	10	1.9	17	0	0.0

3a

	STUDENTS			FACULTY		
	# White	# Minority	% Minority	# White	# Minority	% Minority
Harrington	419	0	0.0	15	0	0.0
Helmer	108	327	75.2	14	2	12.5
Lincoln	305	101	24.9	14	1	6.7
Longfellow	407	6	1.5	14	0	0.0
Mathilda B. Honer	118	12	9.2	6	0	0.0
McCulloch	196	280	58.8	14	4	22.2
Ridgeway	334	0	0.0	11	0	0.0
Sharp Park	362	16	4.2	12	0	0.0
TA Wilson	369	15	3.9	15	0	0.0
Tomlinson	293	191	39.5	15	1	6.3
Trumbull	372	6	1.6	13	0	0.0
<i>Total:</i>	11,981	2116	15.0	499	31	5.8

4a

JACKSON PUBLIC SCHOOLS 1970-1971

Source: *Directory of Public Elementary and Secondary Schools in Selected Districts: Enrollment and Staff by Racial/Ethnic Group*, U.S. Dept. of Health, Education, and Welfare, Office for Civil Rights, Washington, D.C.: GPO, Fall, 1970

	STUDENTS			FACULTY		
	# White	# Minority	% Minority	# White	# Minority	% Minority
High Schools						
Jackson	1354	182	11.8	66	2	2.9
Parkside	1096	238	17.8	66	4	5.7
Junior High Schools						
East	530	157	22.9	28	4	12.5
Frost	754	118	13.5	34	5	12.8
Hunt	710	124	14.9	36	2	5.3
Northeast	651	122	15.8	37	1	2.6
Elementary Schools						
Allen	412	93	18.4	24	2	7.7
Amy Firth	272	16	5.6	10	0	0.0
Austin Blair-Reed	237	25	9.5	6	2	25.0
Bennett	441	24	5.2	18	0	0.0
Blackman	219	80	26.8	11	0	0.0
Bloomfield	413	4	1.0	13	1	7.1
Cascades	421	5	1.2	13	0	0.0
Dibble	267	14	5.0	9	0	0.0

5a

	STUDENTS			FACULTY		
# White	# Minority	% Minority	# White	# Minority	% Minority	
Griswold	481	30	5.9	18	0	0.0
Harrington	310	2	0.6	10	0	0.0
Harrington Primary	137	1	0.7	5	0	0.0
Helmer	48	303	86.3	14	4	22.2
Lincoln	309	132	29.9	14	1	6.7
Longfellow	350	6	1.7	12	0	0.0
Mathilda B. Honer	152	18	10.6	5	1	16.7
McCulloch	165	300	64.5	15	4	21.1
Ridgeway	296	1	0.3	10	0	0.0
Sharp Park	299	13	4.2	10	0	0.0
TA Wilson	411	0	0.0	14	0	0.0
Tomlinson	272	181	40.0	16	1	5.9
Trumbull	315	6	1.9	10	0	0.0
Reed	57	4	6.6	2	0	0.0
<i>Total:</i>	11,379	2199	16.2	526	34	6.1

6a

JACKSON PUBLIC SCHOOLS 1972-1973

Source: *Directory of Public Elementary and Secondary Schools in Selected Districts: Enrollment and Staff by Racial/Ethnic Group*, U.S. Dept. of Health, Education, and Welfare, Office for Civil Rights, Washington, D.C.: GPO, Fall, 1972

	STUDENTS			FACULTY		
	# White	# Minority	% Minority	# White	# Minority	% Minority
High Schools						
Jackson	1297	229	15.0	52	3	5.5
Parkside	1200	245	17.0	49	3	5.8
Junior High Schools						
East	495	136	21.6	23	3	11.5
Frost	788	118	13.0	30	2	6.3
Hunt	654	115	15.0	31	2	6.1
Northeast	619	140	18.4	28	1	3.4
Elementary Schools						
Allen	392	87	18.2	19	2	9.5
Amy Firth	269	38	12.4	9	2	18.2
Bennett	373	76	16.9	16	2	11.1
Blackman	344	56	14.0	12	2	14.3
Bloomfield	337	56	14.2	12	1	7.7
Cascades	323	50	13.4	12	1	7.7
Dibble	221	58	20.8	9	1	10.0
Griswold	429	60	12.3	14	2	12.5

7a

	STUDENTS			FACULTY		
	# White	# Minority	% Minority	# White	# Minority	% Minority
Harrington	245	29	10.6	8	1	11.1
Harrington Primary	88	20	18.5	4	0	0.0
Heimer	218	150	40.8	12	3	20.0
Lincoln	356	106	22.9	14	2	12.5
Longfellow	350	62	15.0	12	2	14.3
Mathilda B. Honer	121	28	18.8	6	0	0.0
McCulloch	194	100	34.0	10	2	16.7
Ridgeway	264	66	20.0	10	2	16.7
Sharp Park	288	56	16.3	12	1	7.7
TA Wilson	275	64	18.9	13	2	13.3
Tomlinson	323	78	19.5	16	2	11.1
Trumbull	335	54	13.9	11	2	15.4
Total:	10,798	2277	17.4	444	46	9.4